

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

CONTOUR IP HOLDING, LLC and)	
ION WORLDWIDE, INC.,)	
)	REDACTED - PUBLIC VERSION
Plaintiffs,)	
v.)	C.A. No. 15-1108-LPS-CJB
)	
GOPRO, INC.)	
)	
Defendant.)	

LETTER TO THE HONORABLE CHRISTOPHER J. BURKE FROM JOHN W. SHAW

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Dated: April 26, 2016

April 26, 2016

BY CM/ECF AND HAND DELIVERY

The Honorable Christopher J. Burke
J. Caleb Boggs Federal Building
844 N. King Street
Wilmington, DE 19801



Re: Contour IP Holding, LLC et al. v. GoPro, Inc., C.A. No. 15-1108-LPS-CJB

Dear Judge Burke:

Contour IP Holdings, LLC (“Contour IP”) writes to alert the Court that two exhibits to the April 22, 2016 letter filed by GoPro, Inc., (“GoPro”), (D.I. 35), Exhibits F and G, contain statements made during compromise negotiations about the claim in the action (namely, regarding whether Plaintiffs have the right to assert their infringement claims). Federal Rule of Evidence 408 (“Rule 408”) prohibits the use of such statements to prove or disprove the validity of such a claim.

Upon receiving these exhibits, Contour IP notified GoPro’s counsel and asked for the withdrawal of the exhibits, but GoPro refused. (Exh. A). GoPro asserts that (1) the letters were not marked as Rule 408 communications, (2) that the letters were not compromise offers, and (3) that they fall into the Rule 408(b) exception. (*Id.* at 1).

As to GoPro’s argument (1), Rule 408 does not require that communications be explicitly marked as Rule 408 communications in order to be protected by that rule, and to require otherwise would defeat the purpose of the rule.

As to argument (2), the letters plainly represent “conduct or a statement made during compromise negotiations about the claim” and thus fall within the scope of the rule. Fed. R. Evid. 408(a)(2).



As to argument (3), the letters go directly to whether iON Worldwide, Inc.’s (“iON”) claim against GoPro is valid, in that they are offered as evidence of whether iON has standing to pursue that claim.

Contour IP respectfully requests that the Court decline to consider the contents of Exhibits F and G to GoPro's April 22, 2016 letter on the grounds that consideration of these documents is prohibited by Rule 408. In the alternative, Contour IP respectfully requests the Court's permission to file a motion to strike or to raise a discovery dispute in order to fully brief this issue.

Respectfully submitted,

/s/ John W. Shaw

John W. Shaw (No. 3362)

cc: All counsel of record (by e-mail)
Clerk of Court (by hand delivery)

Exhibit A

From: Flynn, Michael J. [<mailto:michael.flynn@MNAT.com>]
Sent: Monday, April 25, 2016 4:40 PM
To: John Shaw
Cc: Blumenfeld, Jack; Karineh Khachatourian (kkhachatourian@duanemorris.com)
Subject: RE: GoPro / Contour (15-1108) - SEALED Letter to Judge Burke (D.I. 35)

John,

Neither of the e-mails in Exs. F and G were marked as FRE 408 communications, and there was no agreement among the parties to restrict use of the correspondence. In any event, neither message falls within the prohibitions of FRE 408 because they are not compromise offers or negotiations and even if they were, would fall within the exception to FRE 408(b).

MICHAEL J. FLYNN
Morris, Nichols, Arsht & Tunnell LLP
(302) 351-9661 Direct
mflynn@mnat.com

From: John Shaw [<mailto:jshaw@shawkeller.com>]
Sent: Monday, April 25, 2016 01:35 PM Eastern Standard Time
To: Blumenfeld, Jack
Cc: Hoy, Rebecca; MNAT Internal <78269.wilm@wcs.mnat.com>
Subject: RE: GoPro / Contour (15-1108) - SEALED Letter to Judge Burke (D.I. 35)

Jack,

We are concerned that GoPro has filed with the Court (as Exhibits F and G to its April 22 letter) communications that are subject to FRE 408. Please immediately notify the Court and take necessary steps to retract these documents and discussion thereof. If you disagree, please immediately provide your position and an explanation.

Thank you.

John

From: Hoy, Rebecca [<mailto:rhoy@MNAT.com>]
Sent: Friday, April 22, 2016 5:56 PM
To: Andrew Russell; Blumenfeld, Jack; Ian Brooks; John Shaw; Karen Keller; Karineh Khachatourian; MNAT Internal; Nicole M. Jantzi; Patrick Salceda; Paul Schoenhard
Subject: GoPro / Contour (15-1108) - SEALED Letter to Judge Burke (D.I. 35)

On behalf of Michael J. Flynn, I forward the following:

Docket Text – D.I. 35:

[SEALED] Letter to The Honorable Christopher J. Burke from Michael Flynn regarding the Court's April 19, 2016 Oral Order. (Attachments: # (1) Exhibits A-G)(Flynn, Michael)

REBECCA HOY

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